JUDICIAL COUNCIL OF THE TENTH CIRCUIT

IN RE: CHARGE OF JUDICIAL MISCONDUCT

No. 10-09-90061

Before **HENRY**, Chief Judge.

ORDER

Complainant has filed a complaint of judicial misconduct against a district judge in this circuit. My consideration of this complaint is governed by 1) the misconduct rules issued by the Judicial Conference of the United States, entitled Rules for Judicial-Conduct and Judicial-Disability Proceedings (the "Misconduct Rules"); 2) the federal statute dealing with judicial misconduct, 28 U.S.C. § 351 et seq., and 3) the "Breyer Report," a study by the Judicial Conduct and Disability Act Study Committee, headed by Supreme Court Justice Stephen Breyer, entitled Implementation of the Judicial Conduct and Disability Act of 1980. The Breyer Report may be found at: http://www.supremecourtus.gov/publicinfo/breyer committeereport.pdf. To the extent that any relevant prior decisions of the full Judicial Council of this circuit consistent with those authorities exist, they may also govern my consideration of this complaint.

Complainant has received or has access to a copy of the Misconduct Rules. In accord with those rules, the names of the complainant and subject judge shall not be disclosed in this order. See Misconduct Rule 11(g)(2).

Complainant contends that the subject judge is biased against complainant and should recuse from one or more pending cases which were filed by complainant and assigned to the subject judge. Complainant supports this claim of bias in two ways. First, complainant points to the judge's rulings, both procedural and substantive. Specifically, complainant takes issue with the judge 1) allowing a certain issue to be addressed in complainant's absence; 2) granting the opposition's motion to strike one of complainant's pleadings; and 3) dismissing an underlying case based on an issue raised in another case filed by complainant. To the extent that complainant challenges the rulings themselves or bases the claim of bias on the ruling, these claims are not cognizable as misconduct because they are "directly related to the merits of a decision or procedural ruling." Misconduct Rule 11(c)(1)(B). As explained in the Breyer Report, this exclusion of matters related to the merits of underlying cases protects the independence of the judges deciding those cases. See Breyer Report, App. E., ¶ 2.

Of course, allegations of bias can state a valid claim for misconduct even when the alleged conspiracy relates to a judge's ruling, *see* Commentary to Misconduct Rule 3. However, the Misconduct Rules require complainants to support their allegations with "sufficient evidence to raise an inference that misconduct has occurred." *See* Misconduct Rule 11(c)(1)(D). Besides the rulings themselves, complainant makes three additional allegations: that the judge

1) commented "Thank God I am not on that case," referring to another of complainant's cases filed in the same district court; 2) "badger[ed]" complainant "in questioning," presumably at a hearing; and 3) "scold[ed]" complainant for failing to stand while addressing the court. Based on complainant's own characterizations of these alleged events, I conclude that these allegations neither rise to the level of misconduct on their own, *see* Misconduct Rule 3(h)(1)(D) (misconduct can include "treating litigants . . . in a demonstrably egregious or hostile manner"), nor demonstrate bias on the part of the judge.

Accordingly, this complaint is dismissed pursuant to Misconduct Rule 11(c). The Circuit Executive is directed to transmit this order to complainant and copies to the respondent judge and the Judicial Conference Committee on Judicial Conduct and Disability. See Misconduct Rule 11(g)(2). To seek review of this order, complainant must file a petition for review by the Judicial Council. The requirements for filing a petition for review are set out in Misconduct Rule 18(b). The petition must be filed with the Office of the Circuit Executive within 35 days of the date of the letter transmitting this order. *Id*.

So ordered this 23rd day of November, 2009.

/s/ Robert H. Henry

Honorable Robert H. Henry Chief Circuit Judge